

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

SUSAN LAPSLEY
Director



2008-09-16 PM 1:47

Date: October 6, 2008

To: Roosevelt Moore

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 29(S)**
(CTU2008-0916-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 3341.5(c)(9)(K) dealing with sexual misconduct, indecent exposure and sexually disorderly conduct

On September 16, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, section 3341.5(c)(9)(K) dealing with sexual misconduct, indecent exposure and sexually disorderly conduct constitutes an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA). If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250(a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. (Emphasis added)

Pursuant to Government Code section 11343.6, the filing of a rule with the Secretary of State raises the rebuttable presumption that it was duly adopted and that all the requirements of the APA have been met. You have challenged as an underground regulation California Code of Regulations, title 15, section 3341.5(c)(9)(K), dealing with sexual misconduct, indecent exposure and sexually disorderly conduct. On February 23, 2007, this section was filed with the

Secretary of State as an emergency regulation required for the operational needs of the Department of Corrections and Rehabilitation pursuant to Penal Code section 5058.3.¹ The Certificate of Compliance for Section 3341.5(c)(9)(K) was filed with the Secretary of State on September 5, 2007.²

Section 3341.5(c)(9)(K) has been duly adopted as a regulation and filed with the Secretary of State pursuant to the APA. There is no evidence to rebut the statutory presumption established pursuant to Government Code section 11343.6. Therefore, OAL finds that the challenged rule is not an underground regulation.³

The issuance of this summary disposition does not restrict your right to adjudicate the alleged

¹ Penal Code section 5058.3 provides:

(a) Emergency adoption, amendment, or repeal of a regulation by the director shall be conducted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except with respect to the following:

(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for an emergency adoption, amendment, or repeal of a regulation shall be 160 days.

(2) Notwithstanding subdivision (b) of Section 11346.1 of the Government Code, no showing of emergency is necessary in order to adopt, amend, or repeal an emergency regulation if the director instead certifies, in a written statement filed with the Office of Administrative Law, that operational needs of the department require adoption, amendment, or repeal of the regulation on an emergency basis. The written statement shall include a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure. This paragraph provides an alternative to filing a statement of emergency pursuant to subdivision (b) of Section 11346.1 of the Government Code. It does not preclude filing a statement of emergency. This paragraph only applies to the initial adoption and one readoption of an emergency regulation.

....

² Regulations adopted, amended or repealed as an emergency pursuant to Government Code section 11346.1, or pursuant to the alternative procedures for the Department of Corrections and Rehabilitation established in Penal Code section 5058.3, are effective for a limited period. To make the adoption, amendment or repeal of the emergency regulations permanent, the agency must comply with Government Code section 11346.1(c). Government Code section 11346.1(c) requires the rulemaking agency to submit a complete rulemaking file to OAL and to certify that it has completed the rulemaking requirements in the APA within the limited time the emergency regulations are in effect. This is known as a Certificate of Compliance.

³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.


(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

....

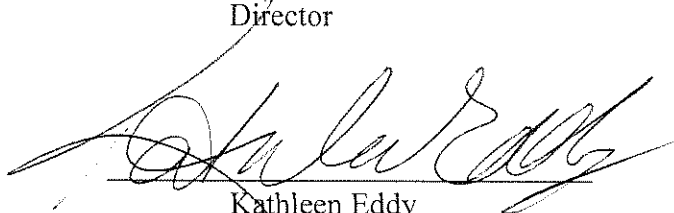
(C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*

.... [Emphasis added.]

violation of section 11340.5 of the Government Code.



SUSAN LAPSLEY
Director



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Timothy Lockwood